BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In re	)	
Application of Four Jacks	)	
Broadcasting, Inc.	)	
	)	FCC File No. BPCT-910903KE
For a Construction Permit	)	
For a New Television	)	
Facility on Channel 2 in	)	
Baltimore, Maryland	)	

TO: The Chief, Mass Media Bureau

REPLY TO OPPOSITION
TO PETITION TO DISMISS

Introduction

Scripps Howard Broadcasting Company ("Scripps Howard"), through counsel, hereby submits its Reply to the "Opposition to Petition to Dismiss" ("Opposition") filed by Four Jacks

offered with respect to the issues raised in an informal objection. See 47 C.F.R. § 73.3587.

II. Four Jacks' untimeliness claim is contradicted by precedent.

First, Four Jacks' claim that the informal objection rule serves solely to permit filings by those lacking standing is plainly erroneous. Section 73.3587 says "any person" may file an informal objection, and this includes persons with standing who offer a late-filed pleading. See, e.g., Universal Communications Corp., 21 Rad. Reg. 2d (P&F) 359, 362 (1971).

Second, as Four Jacks' president should know from his personal experience, the Commission has considered the merits of a Section 73.3518 issue when the argument was presented after an order had issued designating the competing application for hearing. See Comark Television Inc., 51 Rad. Reg. 2d (P&F) 738 (1982) (focusing on the multiple interests of Four Jacks' president, David D. Smith). Scripps Howard's presentation of the issue here--before the case may be erroneously designated for hearing--is far more timely.

Finally, the prompt correction of the mistaken decision to accept Four Jacks' application for filing is obviously a matter of decisional significance, and the immediate correction of the error will avoid the wasteful expenditure of resources by the Commission, by Scripps Howard, and by Four Jacks' principals. The orderly and efficient conduct of the Commission's business, plus conservation of the public's scarce resources, requires consideration of this issue at this time.

III. Four Jacks' claim that its application is consistent with the rules is contradicted by the plain language of Section 73.3518.

Four Jacks' Opposition states that "under any test, the Four Jacks application is not an inconsistent application," Opposition at 1, and it elsewhere claims that the "application is fully consistent with Commission rules," Opposition at 9. Four Jacks' Opposition makes no effort, however, to refute the fact that its application could not have been granted while its principals' application for renewal of Station WBFF(TV)'s license remained pending. The application thus necessarily fails the simplest and most crucial test: the one presented by the plain language of Section 73.3518.[1] As discussed below, Four Jacks' claim fails every other potential test as well.

IV. Four Jacks' argument that Four Jacks and the renewal applicant are not the "same applicant" for purposes of Section 73.3518 is contradicted by Commission precedent and by the rule's express language.

Four Jacks repeatedly seeks recognition that Four Jacks is not the same entity as the license renewal applicant for Station WBFF(TV). See Opposition at 3 and 9-10. In raising this issue, however, Four Jacks ignores a key fact: Commission precedent

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[1] Section 73.3518 provides:

> While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same application, successor or assignee.

47 C.F.R. § 73.3518 (1991).

holds that where, as here, the same entities hold majority or controlling interests in the relevant applications, the inconsistent application rule applies. See Petition at 7-9.

Four Jacks' argument is particularly disingenuous in light of the fact that each of its four individual principals holds precisely the same level of equity interest (25%) in Four Jacks as he holds (through various corporations) in Chesapeake, the renewal applicant.[2] Because the underlying principals are thus the same, Four Jacks' application unquestionably was filed "for the benefit of" the persons who applied for renewal of Channel 45 through Chesapeake. See text of Section 73.3518 at n.1, supra.

V. Four Jacks' argument that Chesapeake's renewal application is no longer pending is irrelevant.

Four Jacks urges that the Commission take note that the Chesapeake renewal application has been granted and that therefore no inconsistent applications now are pending. Opposition at 3. Similarly, Four Jacks later urges that "[i]t is immaterial that the license renewal application for Channel 45 was pending," noting that the renewal application remained pending only "for a very short period of time after the Four Jacks' application was filed." Opposition at 7.

Scripps Howard's Petition recognizes that the Chesapeake renewal application has been granted and points out that this is

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[2] The renewal applicant was Chesapeake Television, Inc. Its successor as licensee of Station WBFF(TV)--after a short form assignment and without any change in the entities' ultimate ownership--is Chesapeake Television Licensee, Inc. This pleading will refer to either as "Chesapeake."

irrelevant because the Commission must review compliance with Section 73.3518 as of the date of the filing of the inconsistent application. See Petition at 9-10. As noted there, this is the emphasized holding of Big Wyoming Broadcasting Corp., 2 F.C.C.R. 3493 (1987). Four Jacks' Opposition offers no answer to this point.

Equally as important, the Commission could not possibly base a rational rule interpretation or rule waiver policy on a post hoc assessment of the length of time one inconsistent application remains pending after the rule violation occurs. As the Court of Appeals for the D.C. Circuit has recently held, an agency may not apply its rules arbitrarily but must articulate a policy rationale as to why any deviation it takes from the rule better serves the public interest. See Northwest Cellular Telephone Co., L.P. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

To excuse violative applications based on the duration of the violation would be particularly arbitrary with respect to broadcast renewal applications. It is incontestable that these applications can take decades to process and the likelihood of a

applying or not applying the rule based on the length of time one inconsistent application remains pending after the rule violation occurs would actually encourage rule violations by permitting an applicant to "roll the dice" that one of its inconsistent applications might be resolved before the FCC could focus on the inconsistency issue.

VI. The sole new "authority" offered in Four Jacks' Opposition is an internal FCC staff memorandum which discusses a separate FCC rule, and this document actually supports Scripps Howard's position.

Four Jacks' Opposition relies on an internal memorandum to the FM Branch whose express purpose squarely supports Scripps Howard's position. The memorandum reminds the staff of the "need to be alert to potential violations of the contingent application rule and [to] return or dismiss the errant application when appropriate." Opposition at Attachment A. While the "contingent application" rule (47 C.F.R. § 73.3517) is wholly distinct from the "inconsistent application" rule relied upon by Scripps Howard, it is evident that the staff memorandum's direction to require the dismissal of applications filed in violation of that rule is fully consistent with and supportive of Scripps Howard's argument. The memorandum could conceivably help Four Jacks only

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but a copy has never been submitted to the Commission by Chesapeake for association with that station's records as required by Section 73.3613(b), 47 C.F.R. § 73.3613(b). Further, Section 73.3539(b), 47 C.F.R. § 73.3539(b), provides that consideration of Chesapeake's renewal application could not properly occur until all the information required by Section 73.3613 is on file. Thus, any Four Jacks claim about the short pendency of the Chesapeake renewal application must be balanced by that applicant's principals' failure to supply required information for consideration with that application.

if Four Jacks could make the inconsistent Chesapeake renewal application disappear, and Four Jacks' efforts to wish away that application simply cannot succeed.

Finally, it is revealing that Four Jacks claims that the staff memorandum's "principle . . . has been upheld in a long line of cases," but fails to cite a single such case. If any of these unnamed cases were persuasive, why would Four Jacks cite an internal staff memorandum instead of that case?[4]

Finally, it must be noted that even if the staff memorandum offered support to Four Jacks' position, a staff decision (particularly an unpublished internal memorandum) has no binding effect on the Commission. See, e.g., Amor Broadcasting v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1990). Scripps Howard's Petition presented Commission decisions which are directly on point and which hold that an application for new facilities cannot be accepted while a renewal application is pending for facilities in the same service and in the same market. See Petition at 4-7 (see also the discussion immediately below). A contrary staff memorandum or even routinely contrary staff practices would not warrant departure from such precedent.

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[4] This is not the Opposition's only reliance on phantom cases. Four Jacks later urges that "numerous cases" permit divestiture proposals in order to comply with Section 73.3518. See Opposition at 6. None of the "numerous cases" are cited, and Scripps Howard's research found only the opposite--that a divestiture proposal cannot mitigate a violation of Section 73.3518. See discussion infra at 8-9.

VII. Four Jacks' analyses of the cases cited in Scripps Howard's Petition both ignore Scripps Howard's explanation of the cases' relevance and are contradicted by express language in the cases themselves.

A. It is remarkable that Four Jacks attempts to claim support for its position from **Valley Broadcasting Co.**, 58 Rad. Reg. 2d (P&F) 945 (1985) and **Comark Television, Inc.**, 51 Rad. Reg. 2d (P&F) 738 (1982). As Scripps Howard's petition made clear, Petition at 7-8, the Commission emphasized in Comark that Section 73.3518 did not apply to require dismissal only because David D. Smith's interests were minority interests, not because, as Four Jacks asserts, "a divestiture proposal eliminated the multiple ownership problem," Opposition at 5. That is, before it reached the question of whether a divestiture proposal could suffice to permit the processing of the applications, the Commission announced its critical holding that Section 73.3518 did not apply, stating:

> Comark's applications do not violate § 73.3518 of the Rules. The applications of Comark and Commercial Radio Institute, Inc. were not filed "by or on behalf of or for the benefit of the same applicant" as provided in the rule. In this regard, the mere fact that David D. Smith has an interest in both corporations does not in itself establish common control or an identity of interests sufficient to make the corporations "the same applicant." Thus, there are no grounds for dismissing Comark's application.

51 Rad. Reg. 2d at 741. Only after making this finding did the Commission assess whether David D. Smith's promise to divest his minority interests if necessary would suffice to permit the continued processing of the relevant applications. Id. at 742.

If anything, the Commission in Valley Broadcasting Company was even more adamant in requiring a lack of common control before a divestiture proposal could avoid the requirement of immediate dismissal. In responding to a challenge that two pending applications (one radio and one television) in which William Hernstadt had interests violated Section 73.3518 (and the separate rules against contingent and multiple applications), the Commission stated:

> Of pivotal importance in this case is the extent, if any, to which Hernstadt controls the television applicant.

58 Rad. Reg. 2d at 947 (emphasis added). Then, after finding that Mr. Hernstadt's interest in the television applicant was only a minority interest and was not controlling, the Commission concluded that a promise to divest this minority interest sufficed. Id. at 948. The Commission further explained that because Mr. Hernstadt held 100% of the interests in the application for the radio property, a promise to divest his interest in that application would not have sufficed to avoid dismissal. Id.

As discussed earlier, there is no question that since the underlying principals of Four Jacks and Chesapeake are the same persons, the applicants here are under common control and share "an identity of interests." Thus, these two cases strongly support the view that Section 73.3518 demands dismissal of the Four Jacks application.

B. Four Jacks' analysis of **Big Wyoming Broadcasting Corp.**, 2 F.C.C.R. 3493 (1987) misstates the propositions for which Scripps Howard cited the case. The case in fact strongly

[redacted]

application be dismissed. Four Jacks commences its analysis of the Atlantic case by misstating the critical fact in the case. Four Jacks wrongly describes Atlantic's proposal as one "for a construction permit to change the frequency . . . of Station WUST, Bethesda, Maryland." Opposition at 6 (emphasis added). Note 1 of the Atlantic decision directly contradicts Four Jacks' statement of the case as follows:

> The [Atlantic] application purports to be an application for a new station in Washington. However, since a licensee may not hold licenses for two stations serving a substantial area common to both, as is the case with WUST and WOL, the Commission will consider the captioned application as an application for a change in the facilities of Station WUST.

Atlantic Broadcasting Company, 8 Rad. Reg. 2d at 968 n.1 (emphasis added). This express rejection of Atlantic's proposal for a new facility is the holding of Atlantic that is relevant to the current case, and it is note 1 which Scripps Howard consistently cited for the proposition that Four Jacks' proposal for a new station is impermissible. See Petition at 2 and 5.

In addition, in direct contradiction to Four Jacks' claim that Scripps Howard "ignored the Commission's clear holding in Atlantic that an application for renewal of license on one channel is not inconsistent with prosecuting an application to shift to another channel," Opposition at 7, Scripps Howard's Petition in fact emphasizes and relies upon this finding. The Petition argues that a frequency shift application like that required by the Commission in Atlantic--not an application for a

new station--is the only means for an applicant to pursue an authorization to operate on a different channel while also seeking renewal of its current channel's license. Petition at 5. The Petition then pointed out that Four Jacks' application, unlike Atlantic's, cannot be treated as such a modification proposal because Four Jacks--as stressed in Four Jacks' own Opposition at 3 and 8-9--is a separate corporate entity from the license renewal applicant. Petition at 6.

Four Jacks similarly misrepresents the holding of Wabash Valley Broadcasting Company. Four Jacks again wholly ignores the fact that in Wabash Valley, like Atlantic, the Commission found it necessary to treat what purported to be an application for new facilities as an "application for a change in facilities." Wabash Valley, 18 Rad. Reg. at 568. Crucially, the Commission then expressly held that this application as so modified and Wabash's renewal application "are not therefore 'inconsistent or conflicting' within the meaning of § 1.308 [now § 73.3518] of the Rules." Id. (emphasis added).

The Commission itself has further explained Wabash Valley's holding as follows:

> In Wabash Valley, we permitted simultaneous prosecution of an application for renewal of existing facilities and an application for a different frequency in the same community. We said, referring to the application for different facilities, that:
>
> > the latter application is an application for a change in facilities, and hence, if granted, would serve to vacate any grant to

> Wabash of its channel 10 application.
>
> Thus, the Commission held in the Wabash Valley case that, although it was called an application for a new station to operate on channel 2, it was really a modification from channel 10 to channel 2 which, if granted, would leave channel 10 open for new applications.

Southern Keswick, Inc., 34 F.C.C.2d 624, 625. Four Jacks simply ignores the fact that Wabash Valley's holding bars the processing of its application for new facilities because its principals did not propose to shift the frequency of Channel 45, but instead have pursued what is unavoidably an inconsistent application.

Finally, in what can most charitably be described as an extraordinarily careless reading of Wabash Valley, Four Jacks claims that "[t]he Commission stated that the inconsistent application rule 'is applicable only to two or more applications for new or additional facilities.'" Opposition at 8. The rule being discussed by the Commission in the cited language in fact is not the inconsistent application rule (now Section 73.3518), but rather the multiple applications rule (now Section 73.3520), which is limited by its express terms to applications for "new or additional facilities." See 18 Rad. Reg. at 568. The inclusion of this language in Section 73.3520, of course, actually supports Scripps Howard's position (and the holding of Wabash Valley) that Section 73.3518--where no such limiting terms are included--must apply to renewal applications.

VIII. Four Jacks' policy arguments are contradicted by the Commission's rules and case precedent.

First, Four Jacks argues that its principals could not follow the path approved by the Commission in the Atlantic and Wabash Valley decisions because Chesapeake is a separate entity from Four Jacks and because Chesapeake's Station WBFF(TV) operates on UHF Channel 45 rather than VHF Channel 2. Opposition at 8-9. Scripps Howard agrees that Four Jacks cannot now amend its application to comply with the requirements of Section 73.3518 and the Atlantic and Wabash Valley decisions. Nothing prevented Four Jacks's principals, however, from pursuing in the first instance an application to modify the Channel 45 facilities to specify operation on Channel 2. Such an application for frequency change is expressly contemplated by the rules. See, e.g., 47 C.F.R. §§ 73.3538(a)(1) & 73.3572(a)(1). Four Jacks' principals' election to set up an entirely new corporate entity to pursue the Channel 2 application was their voluntary choice, and Four Jacks now must suffer the consequences of failing to pursue its goal in accord with the rules and Commission precedent.

Second, Four Jacks distorts Scripps Howard's argument that sound policy precludes permitting Four Jacks to sell for private gain an authorization which it has proposed to abandon if it should gain the inconsistent authority to operate on Channel 2. See Petition at 10. Four Jacks argues, inter alia, that the Commission does not disapprove of private gain when an authorization is conditioned on divestiture of existing

facilities and that Scripps Howard's policy argument is speculative and enjoys no support in Commission precedent. Opposition at 9. As noted in the Petition at 10, however, the Commission has ruled that permitting the sale of an existing facility would not serve the public interest when an applicant for new broadcast facilities in fact seeks to relocate to a new channel in the same community. See Southern Keswick, Inc., 34 F.C.C.2d 624, 625-27 (1972). In that case, the Commission rejected the applicant's goal of "proposing to select its own successor to a frequency in which it can have no further interest while at the same time continuing to operate on another frequency in the same area." Id. at 626. The Commission noted that the abandoned frequency should instead "revert to the public domain" upon grant of the application for different facilities. Id.

Such a public interest policy is particularly appropriate at the present time when the Commission has decided that there is a substantial need for conserving the broadcast spectrum in major markets and has recently determined not to lift the current freeze on new NTSC television applications in major markets. See Second Report & Order/Further Notice of Proposed Rulemaking in MM Docket No. 87-268, FCC 92-174 (released May 8, 1992). Conceivably, had Chesapeake sought to move its operation to Channel 2 in the proper way and succeeded, the Channel 45 allocation might have been used to further the transition to advanced television service. Chesapeake's principals, however, chose to structure their application through Four Jacks so as to

preclude any such public interest benefit. The Southern Keswick decision stands for the proposition that such a tactic cannot succeed.

Four Jacks' suggestion that its principals might not receive any gain from the sale of its authorization for Channel 45, a Fox affiliate in a major market, is remarkable. See Opposition at 9.

Scripps Howard would be particularly prejudiced due to the distorted posture in which processing the Four Jacks application would place the comparative issues, Petition at 11-12; and

- that processing Four Jacks' rule-violating application would delay the processing of applications for genuinely new services while offering at most only the limited benefit of permitting an existing licensee to extend its principals' ability to offer television service to a broader geographic area, Petition at 12-13.

Conclusion

Four Jacks' parting claim--that Scripps Howard is seeking to delay this proceeding--is also false and is contradicted by the fact that the longer this proceeding continues, the longer Station WMAR-TV's renewal will remain under a cloud.

In sum, Four Jacks' Opposition fails to raise any valid argument in favor of its position. Contrary to Four Jacks' claims, the Four Jacks application is not consistent with the Commission's rules but is unquestionably violative of Section 73.3518. This rule, Commission precedent, and sound public

policy all require the immediate dismissal of Four Jacks' application.

Respectfully submitted,

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May 26, 1992

CERTIFICATE OF SERVICE

I, Ruth E. Omonijo, a secretary at the offices of Baker & Hostetler, certify that on this 26th day of May, 1992, copies of the foregoing "Reply to Opposition to Petition to Dismiss" were hand delivered to the following:

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Certificate of Service

I, Ruth E. Omonijo, a secretary in the law offices of Baker & Hostetler, here certify that I have caused copies of the foregoing "Petition for Certification" to be hand-delivered this 8th day of April, 1993 to the following:

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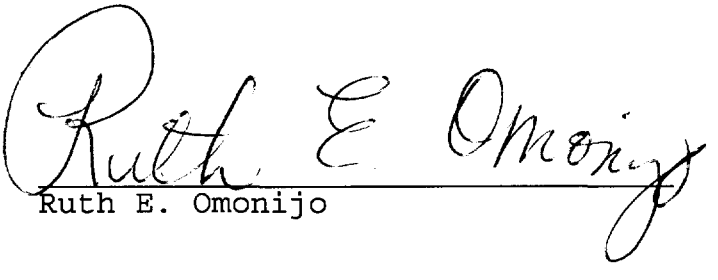

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